Res., Soc. Dev. 2019; 8(9):e30891295

ISSN 2525-3409 | DOI: http://dx.doi.org/10.33448/rsd-v8i9.1295

Regulamentos Governamentais para o Direito de Investimento na Indonésia

Government Regulations toward Investment Law in Indonesia

Regulaciones gubernamentales hacia la ley de inversiones en Indonesia

Recebido: 12/06/2019 | Revisado: 22/06/2019 | Aceito: 25/06/2019 | Publicado: 26/06/2019

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Resumo

O setor econômico é um dos indicadores de bem-estar público, conforme delineado na abertura do quarto parágrafo da Constituição de 1945, ou seja, o bem-estar da vida da nação. No atual desenvolvimento econômico, ele desencadeou a importância do investimento para que a Indonésia possa competir no domínio da concorrência no mercado global. Mas a dependência do investimento estrangeiro será um boomerang para a Indonésia. Assim, este estudo tem como objetivo descobrir a lei de investimento regulada pelo governo na Indonésia. Posteriormente, a abordagem normativa relativa ao investimento estrangeiro na Indonésia será descrita como método neste estudo. Com base no estudo, concluiu-se que, com a existência da Lei nº 25/2007, relativa a investimentos e diversos regulamentos de execução, era uma forma de ação governamental voltada para o desenvolvimento do setor de investimentos. Portanto, o regulamento pode fornecer proteção legal tanto para cidadãos indonésios quanto para investidores estrangeiros.

Palavras-chave: regulamentações governamentais; lei de investimento; investidores estrangeiros

Abstract

Economic sector is one of public welfare benchmarks as outlined in the opening of the 4th paragraph of the 1945 Constitution, namely the welfare of the nation's life. In the current

ISSN 2525-3409 | DOI: http://dx.doi.org/10.33448/rsd-v8i9.1295
economic development, it has triggered the importance of investment for Indonesia to be able to compete in the realm of global market competition. But the dependence on foreign investment will be a boomerang for Indonesia. Thus, this study is aimed to find out the investment law regulate by Government in Indonesia. Afterward, normative approach relating to foreign investment in Indonesia will be described as method in this study. Based on the study, it was concluded that with the existence of Law Number 25/2007 concerning investment and various implementing regulations, it was one form of government action concerned with the development of the investment sector. Therefore, the regulation can provide legal protection for both Indonesian citizens and foreign investors.
Keywords: government regulations; investment law; foreign investors.

Resumen

El sector económico es uno de los puntos de referencia de bienestar público como se describe en la apertura del cuarto párrafo de la Constitución de 1945, a saber, el bienestar de la vida de la nación. En el desarrollo económico actual, ha desatado la importancia de la inversión para que Indonesia pueda competir en el ámbito de la competencia del mercado global. Pero la dependencia de la inversión extranjera será un boomerang para Indonesia. Por lo tanto, este estudio tiene como objetivo conocer la ley de inversiones regulada por el gobierno en Indonesia. Posteriormente, el enfoque normativo relacionado con la inversión extranjera en Indonesia se describirá como método en este estudio. Sobre la base del estudio, se llegó a la conclusión de que con la existencia de la Ley número 25/2007 sobre inversiones y diversos reglamentos de implementación, era una forma de acción gubernamental relacionada con el desarrollo del sector de inversión. Por lo tanto, el reglamento puede brindar protección legal tanto a los ciudadanos indonesios como a los inversores extranjeros.
Palabras clave: regulaciones gubernamentales; ley de inversiones; inversores extranjeros.

1. Introduction

Economic sector can be described as a measure of societies' welfare. A good economic condition will bring the country into an advanced state. In this case, a good and equitable economy for all levels of society is the initial goal of Indonesian as stated in the opening of Indonesia Constitution of 1945 in the 4th paragraph, namely the welfare of the nation's life.

Afterward, economic development nowadays has entered the era of capital markets, meaning that the non-physical boundaries between countries are increasingly difficult to

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distinguish and tend to be borderless (Salim & Sutrisno, 2008). The closure of the boundary between one country and another is caused by the increasing information and transportation system. The development of information has eased people to know the economic condition of other countries. Thus, it will lead into a wide range of investors which is interested to invest in such country.

According to Kuntjoro-Jakti (1986), the increasing economy in many countries has ultimately creating a higher degree of economic openness in the world, which is seen not only in the flow of goods but also the flow of services, money and capital. In turn, the flow of investment in the world is increasingly following the development of this openness, therefore, nowadays the increase in investment flows is what drives the trade's flow in the world.

Therefore, it is not surprising that the development of investment currently progressing along with economic development towards the era of globalization. Then, investment considered as one of the important factors in the country's economic development (Salim & Sutrisno, 2008). However, the capital investment can be a boomerang for countries who are receiving the capital, in case they will depend on foreign capital.

Afterward, investment in Indonesia is considered to be important since Indonesia is a developing country which needs an input of funds to carry out the development. In addition, Indonesia also needs more experiences in developing economic field from knowledge, technology and human resources transfer that can improve the Indonesian economic sector.

On the other hand, the presence or the continued support of foreign funds make Indonesia becomes depend on foreign revenues (Margono, 2008). Thus, it will have a negative impact if one day foreign parties are no longer invest in Indonesia. However, it is the current main problem for the Indonesia in carrying out the economic development of the country.

2. Methodology

In this study, normative approach is used to analyze laws and regulations relating to the presence of foreign investment in Indonesia. The reason to choose this research method is due to the materials derived from legislation and other legal sources. Afterward, the data presentation on this task is not the result of research directly by the author, but comes from legislation and literature.

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3. Discussions

3.1. Investment Law

The term investment law originates from an English translation, namely investment law. Putra, et al. (2001), stated the notion of investment law as follows:

> "Legal norms regarding the possibilities of investment, conditions, protection and most importantly directing investment to create prosperity for the society."

In this definition, investment law is constructed as a legal norm. This legal norm examines the possibility of doing it:

1. Investors;
2. Investment conditions;
3. Protection, and;
4. Welfare for the community.

Every investment effort must be directed towards the welfare of the community. It means that the investment invested by investors can improve the quality of the Indonesian community (Margono, 2008). The weakness of this definition is the construction of the relationship between the capital owner and the recipient of capital and using possible words of investment. Possible words mean that investment can or cannot be made by investment. Even though with investors, it is expected that investment can be carried out in Indonesia.

The term investment comes from Latin, namely *investire* (use), while in English it is called investment (Downes & Goodman, 1994). In the Indonesian Encyclopedia, investment is interpreted in the field of production process. This means that investments are invested solely for the production process, but also activities to build various facilities and infrastructure that support investment activities.

In addition, the investment law can be defined as the relationship between investors and recipients of capital (Sembiring, 2014). The status of investors can be classified into two types, namely foreign investors and domestic investors. Foreign investors are investments originating from abroad, while domestic investors are investments originating from within the country. Business fields are fields of activity that are permitted or allowed to invest. Procedures and conditions are procedures that must be met by investors. The countries that usually receive investment are developing countries.

From the description above, it can be stated the elements of investment law, namely;

1. The existence of legal rules;

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2. The existence of a subject, where the subject in the investment law is the investor and the recipient of the investment;
3. The existence of business sectors that are permitted for investment;
4. Procedures and requirements for conducting an infestation;
5. Country.

The rules of investment law are classified into two types, namely written and unwritten legal rules of investment. The principle of written investment law is the rule of law governing investment, wherein the rule of law is contained in laws, treaties, jurisprudence, and doctrine. Then, unwritten investment law is a legal rule that lives and develops in society. In general, people who make investments are based on unwritten rules.

Investment is divided into two types, namely foreign investment and domestic investment. Foreign investment is an investment originating from foreign financing. And domestic investment is an investment originating from domestic financing.

3.2. Investment in Indonesia

Indonesia is a developing country that has high demand in investment by many foreign investors. The interest of foreign investors is caused by the strategic location of Indonesia in trading. The development of the globalization era, the investment that is invested in Indonesia is increasing. The large number of foreign investments entering Indonesia is a real form of the intention of the Indonesian people to carry out national development. To carry out such development, it is undeniable that capital is not small. If only relying on capital from the APBN (the Indonesian Budget), it can almost certainly be rather difficult to implement national development. For this reason, it is necessary to have other sources, one of the sources of capital that can be utilized is through investment law or investment institutions.

The role of foreign investors in national builders is very important in mining capital as well as knowledge and human resources. In terms of this, many countries are competing to become the destination of foreign investment. On the other hand, the investor's point of view with the openness of the market in the era of globalization opens up opportunities to invest in Indonesia. This is because for many years the paradigm that emerged was that Indonesia was rich in natural resources. This paradigm is a force for Indonesia to attract as many foreign investors as possible.

Many foreign investors entering Indonesia should be the starting point for Indonesia to use it. Therefore investment must be part of the implementation of the national economy and be placed as an effort to increase the growth of national economy, create jobs, improve

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sustainable economic development, increase national technological capacity and capabilities, encourage the development of a populist economy, and realize the people's welfare in a system competitive economy. So the existence of foreign investment in national development has many benefits if it is managed properly.

According to Sujud Margono, argue that there are several factors that lead foreign investors to invest in Indonesia, such as:

1. Labor factor. Labor wages are relatively cheap. This can reduce production costs. In developing countries (Indonesia) there is an abundant workforce.
2. Close to raw resources. In developed countries raw material sources are limited. Meanwhile, in developing countries, raw materials have not been exploited optimally. Because they have sufficient capital, they move their industry to developing countries.
3. Looking for a new marketing area. In addition to investing capital, foreign investors are also trying to get market access to local consumers in developing countries. Access to consumers can be performed by selling the following products and spare parts.
4. License and technology transfer. Foreign investment is usually followed by transfer of technology and generally by licensing mechanisms. The technology transfer process is carried out through intellectual property rights licensing.
5. Facilities/incentives. Providing facilities/incentives is one of the attractions of foreign investors in investing their capital.

By the potential that Indonesia has, Indonesia should become a developing country. However, on the contrary, in the course of its response to the presence of foreign investors, it has not been well-managed, as a result, Indonesia has become dependent or addicted to foreign investors. Dependence is because Indonesia does not have the ability to process resources owned by Indonesia.

Indonesia’s unpreparedness to receive the heavy flow of investment in this globalization era will bring Indonesia even worse. It means that foreign investment is the main foundation for the life of Indonesia. If in this condition the investors withdraw their investments, then Indonesia cannot be denied will experience destruction. This is what should be the government’s attention to overcome the flow of foreign investment. In this case, the role or intervention of the government is needed to regulate the entry of foreign investment so as not to harm the State of Indonesia.

According to Sumantoro (1990), it is necessary to find the motives of investors seeking profits as an effort to achieve national development goals. Further, in order to attract the foreign investors to invest their capital, the government must provide facilities and infrastructure and other facilities. As a consequence, the government needs to carry out well-planning, including establishing effective implementation and supervision policies, so therefore, national development objectives are achieved. By using this approach, the role of investors can be directed development priorities.

As a law rules, the government’s role in the globalization era is creating a legal agreement that regulates the entry of foreign investment, hence it will not harm the Indonesian state. Currently, the government has created various laws and regulations concerning the latest capital market, namely Law Number 25 of 2007 concerning investment. In Article 3 paragraph (1) Law Number 25 of 2007 concerning Investment has been determined 10 principles in investment. The ten principles are presented below.

1. The principle of legal certainty, namely the principle in a state of law which places the law and provisions of legislation as the basis for every policy and action in the field of capital investment.
2. The principle of openness, namely the principle that is open to the right of the community to get correct, honest and non-discriminatory information about activities and investments.
3. The principle of accountability, namely the principle that determines every activity and the end result of the implementation of investment. In case, if it is accountable to the community or the people as holders of state sovereignty in accordance with the provisions of statutory regulations.
4. The principle of equal treatment is the principle of non-discriminatory service treatment based on the provisions of legislation, either between domestic investors or investors from one foreign country and investors from other foreign countries.
5. The principle of togetherness is the principle that encourages the role of all investors together in business activities to realize people's welfare.
6. The principle of fairness is the principle underlying the implementation of investment by promoting fair efficiency in an effort to realize a fair, conducive and competitive business climate.
7. Continuous principle is a principle that is planned to strive the development process through investment to ensure prosperity and progress in all aspects of life, both in the present or in the future.
8. The principle of environmental insight is the principle of investment that is carried out while observing and prioritizing environmental protection and maintenance.

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9. The principle of independence is the principle of investment carried out while prioritizing the potential of the nation and the state by not closing themselves to the entry of foreign capital to realize economic growth.
10. The principle of the balance of progress and unity of the national economy is the principle that seeks to maintain the balance of economic progress in the unity of the national economy.

In addition, the legal principles above, in the Agronomic on Trade Related Investment Measures (TRIMs) using the principle of non-discrimination. The principle of non-discrimination, namely the principle in investment does not differentiate between foreign and local investments since the investment itself is borderless state (not concerning national boundaries). Thus, it can be said that investment invested by investors is not differentiated between foreign investment and local investment. This principle has been incorporated into article 3 paragraph (1) letter d of Law Number 25 of 2007 concerning investment. In this provision, there is no differentiation between foreign investment and domestic investment.

By this principle, it is expected that foreign investment which will become a boomerang for Indonesia can improve the Indonesian economy. Various improvements have been made by the government to realize the goal of creating a climate conducive to investment.

Indonesia readiness in facing this era of globalization should be existed since long time ago. Hence, Indonesia which has great potential in terms of Natural Resources can be utilized properly. There are two obstacles faced in foreign investment, namely internal and external. The internal constraints: 1. the difficulty of the company getting the appropriate land or project location; 2. difficulty in obtaining raw materials;3. difficulty in funding/financing; 4. marketing difficulties; 5. there is a dispute between shareholders. The external constraints are: 1. factors in the local, regional and global business environment that do not support and the incentives or incentives that are provided by the government are less attractive; 2. legal issues, 3. security and political stability, 4. the existence of regional regulations, ministerial decrees, laws that contribute to distorting the investment activity.

These obstacles are caused by Indonesia's lack of preparedness to face the world of globalization. In this problem, the emphasis is on legal issues. The law that regulates investment does not have good power. There are still many capital security activities or investments that violate the rules or even rules about modern investment that are not affected by law. Therefore, the law is always left behind in the face of the development of the times which is not sophisticated. Then, law should be able to follow the development of era.

Since Indonesia is currently becoming the destination of many foreign investors, thus, it is needed to be aware to the law importance in regulating the times of investment. If the law cannot cover this, Indonesia will become a puppet of developed countries which will eventually be controlled by the developed country. Government intervention in investment is indeed necessary to avoid the interests of foreign investors who want to take large profits so that Indonesia is the country. This is in accordance with Article 4 paragraph 1 of Law Number 25 of 2007 concerning investment: “the government establishes basic investment policies for: a. encourage the creation of a national business climate conducive to investment to strengthen the competitiveness of the national economy; b. accelerate the increase of investment.”

The provision is a form of power that is debated by law to the government to determine policy. In principle, the policy must pay attention to the country’s goals, namely the welfare of the community. Therefore, the attitude of the government should be more respect for the interests of public welfare, since the initial goal of the opening of foreign investment is for national development as well as welfare of the community.

4. Conclusion

Indonesia is a country which has rich potential in natural resources. By the abundant potential of Natural Resources, it attracts interest for foreign investors to invest in Indonesia. The increasing foreign investment in Indonesia has been in line with the development of the era towards the era of globalization. Globalization must be addressed with mature readiness for developing countries, one of which is Indonesia. Indonesia as a developing country has many objectives, investors must have readiness both in terms of human resources and even to the legal aspect. This means that if Indonesian human resources are not ready then the society will continue to be slaves in its own country. Meanwhile, from a legal standpoint, it is expected to provide balance both domestically and abroad, meaning that there is legal certainty for protection by both Indonesian citizens and foreign investors.

To overcome this situation, the government must intervene or intervene in the investment sector or investment. Because in this field if it is not properly regulated, it will have a negative impact on the country of Indonesia. One form of intervention is to create legal certainty in investing. The government has issued Law Number 25 of 2007 concerning investment and various implementing regulations are one form of government action concerned with the development of the investment sector.

ISSN 2525-3409 | DOI: http://dx.doi.org/10.33448/rsd-v8i9.1295

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Indonesia Constitution of 1945

Law Number 25 of 2007

Percentage contribution of each author in the manuscript

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